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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

FORT BELKNAP INDIAN COMMUNITY, GROS VENTRE AND ASSINIBOINE TRIBES, A TRIBAL GOVERNMENT,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX TO THE SUPREME COURT OF THE UNITED STATES

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1. QUESTION PRESENTED

This case presents the question of whether there is jurisdiction in the Court of Claims for the Petitioner Indian Tribe's claim of the existence and breach by the Respondent Government of a fiduciary duty, for the breach of which the Government must respond in damages.

2. TABLE OF CONTENTS

		Page
1.	Question Presented	1
2.	Table of Contents	2
3.	Table of Authorities	4
	Cases	4
	Statutes	6
4.	Order Below	7
5.	Jurisdiction	7
6.	Statutes Involved	8
7.	Statement of the Case	8
8.	Reasons for Granting this Writ..	14
9.	Conclusion	40
10.	Appendix	A-1
	Order of August 6, 1982 In the United States Court of Claims ..	A-2
	Petition of Indian Tribe	A-11
	25 U.S.C. §81	A-38
	25 U.S.C. §160	A-40
	25 U.S.C. §174	A-41
	25 U.S.C. §185	A-42
	25 U.S.C. §331	A-43

25 U.S.C. §348 ..... A-45

25 U.S.C. §462 ..... A-49

25 U.S.C. §470 ..... A-50

25 U.S.C. §476 ..... A-51

25 U.S.C. §477 ..... A-53

28 U.S.C. §1491 ..... A-54

28 U.S.C. §1494 ..... A-56

28 U.S.C. §1505 ..... A-57

Order of October 16, 1978 in the United States Court of Claims A-58

3. TABLE OF AUTHORITIES

Cases

	Page
Aleut Community of St. Paul Island v. United States, 202 Ct. Cl. 182, 480 F.2d 831 (Ct. Cl. 1973)	34
Duarte v. United States, 532 F.2d 850 (2d Cir. 1976)	39
Duncan v. United States, Ct. Cl. ____, ____, 667 F.2d 36 (1981)	30,36
Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967)	19
Gros Ventre & Assiniboine Tribes of the Fort Belknap Indian Community, A Tribal Government v. United States (See Appendix)	11,32 34
Hatzlachh Supply Co. v. United States, 444 US 460 (1980)	39
Joint Tribal Council Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975)	34
Mason v. United States, 461 F.2d 1364, 1374 (Ct. Cl. 1972)	20
Mitchell II - Mitchell v. United States, 229 Ct. Cl. ____, ____, 664 F.2d 265, cert. granted, 50 USCW 3959 (June 8, 1982)	22,26 27,29 30,36
Montana Bank of Circle, N.A. v. United States, (Ct. Cl. No. 328-77, October 6, 1978) (See Appendix	8,9, 10,13 33

Cases, cont. Page

Navajo Tribe of Indians v. United States, 224 Ct. Cl. ____, ____, 624 F.2d 981, 987 (1980) 30,35

Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) 34

Squire v. Capocman, 351 US 1 (1856) 25

United States v. Anderson, 625 F.2d 910, 915 (9th Cir. 1980), cert. den. 450 U.S. 920 101 S. Ct. 1367, 67 LEd.2d, 347 (1981) 35,36

United States v. Clarke, 445 US 253 (1980) 24,25

United States v. Constantine, (1935) 296 US 287, 80 LEd. 233, 56 SCT 223 15

United States v. Duncan, No. 85-1747, 667 F.2d 36 16

United States v. Mitchell, No. 81-1748, 664 F.2d 265 (1981) 16

United States v. Mitchell, 445 US 535, 100 S. Ct. 1349, 63 LEd.2d 607 (1980) 18,21 22,24 25

Mitchell v. United States, 591 F.2d 1300 (Ct. Cl. 1979) Rev'd. 445 US 535 (1980) 21

United States v. New York Rayon Importing Co., 329 US 654,660 (1947).. 39

United States v. Testan, 424 US 392, 398 (1976) 17,18 19,39

Statutes	Page
25 U.S.C. §81	17,31 32,34 36
25 U.S.C. §331	22
28 U.S.C. §1491	17-22 26,38
28 U.S.C. §1505	17,22 38
28 U.S.C. §1525	26

4. ORDER BELOW

The Order of the Court of Claims is currently unreported, but it is printed in the Appendix herein, infra., page A-2. A related case, The Montana Bank of Circle, N.A. vs. The United States, is unreported. (Court of Claims, No. 328-77, October 16, 1978.)

5. JURISDICTION

The jurisdiction of this Court is invoked under the Judicial Code, 27 United States Code, Section 1255(1):

> "§1255. Court of Claims; certiorari; certified questions.
>
> Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted on petition of the United States or the claimant; ... ."

The Order of the United States Court of Claims (Appendix, infra., page A-2)

sought to be reviewed was entered on August 6, 1982.

6. STATUTES INVOLVED

The case involves the following statutes, each set out in the Appendix hereto, infra., beginning at page A-38: 25 U.S.C. §§81, 470, 476 and 477; 28 U.S.C. §§1491, 1494, and 1505.

7. STATEMENT OF THE CASE

The facts material to the consideration of the question presented are as follows. The facts alleged are from the allegations of the petition of Petitioner Indian Community, the Order of the Court of Claims upon which this petition calls in question and the Order of the related case, Montana Bank of Circle, N.A. vs. United States, (Court of Claims, No. 328-77, October 16, 1978), which arises out of the same transactions and events as involved here.

Petitioner, Fort Belknap Indian Community (or Fort Belknap Reservation) is comprised of the Gros Ventre and Assiniboine Indians and the Community's wholly owned corporation, Fort Belknap Builders. Montana Bank of Circle, N.A. vs. United States, op. cit., at page 1, Appendix, infra., at A-58.

In the early 1970's, the Fort Belknap Indian Community embarked on a program of economic development with the strong support of the Bureau of Indian Affairs. Montana Bank of Circle, N.A. vs. United States, op. cit., at pages 1-2, Appendix, infra., at A-58.

The Indians decided to construct a factory building and to enter into the homebuilding business. The Tribal Council established a for-profit corporation, Builders, owned wholly by the Tribe and incorporated under the laws of Montana. Management for Builders was to be pro-

vided by a separate, non-Indian corporation, Economic Consultants, Inc. Montana Bank of Circle, N.A. vs. United States, op. cit. at page 2, Appendix, infra., at A-58.

Financing for the factory project was obtained from the Montana Bank of Circle, N.A., after negotiation involving the BIA and the Indians, the Bank loaning the Tribe $350,000. Of this sum, $150,000 was to be used for the industrial complex and $200,000 by Builders as working capital. Additional funds were supplied by the BIA. Montana Bank of Circle, N.A. vs. United States, op. cit. at page 2, Appendix, infra., at A-58.

The Petitioner Indian Community has alleged that the United States assumed and undertook a relationship of personal confidence and trust with the Indian Community by virtue of Treaty and federal statute with regard to the land, property,

and well-being of Tribal members. Petition of Petitioner, The Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community, A Tribal Government vs. United States, Appendix herein, infra., Page A-11 through A-37, Counts Two, et. seq.

Petitioner claims that Respondent breached a fiduciary or trust duty in the following particulars in said petition in that:

1. The United States allowed the Indian Community to undertake the construction of houses and banking commitments without first investigating the people and their technical, managerial and financial capabilities who would be managing the construction project and who would be responsible for carrying out the commitments of the Indian Community and its wholly owned subsidiary, Fort Belknap Builders, Inc.

2. The United States failed to provide adequate assistance to the Indian Community during its negotiations with those managing as aforesaid, with the various banks, with the Fort Belknap Housing Authority, and with the Housing & Urban Development Department.

3. The United States failed to inform the Indian Community, the Fort Belknap Builders, Inc., creditors, and failed to take appropriate action such as advice and counsel and notification of impending legal actions when the Respondent learned of the jeopardy of the construction project and its management and the mismanagement of Fort Belknap Builders, Inc.

4. The United States committed fraud, misrepresentation, and unfair trade practices in its failure of disclosure of estimates of costs, impossibility of performance, approval of addi-

tional construction contracts, and assignments of housing construction contracts, failure to properly supervise and evaluate, and in otherwise acting or omitting to act as aforesaid in items 1 through 3 above.

5. The United States failed to make required contract payments and drafted specifications for contracts which were defective and impossible of performance.

The Indian Community claims monetary damages in the amount owed to the aforementioned Bank, plus interest, cost, and attorneys' fees.

In its Order of October 16, 1978, the Court of Claims in The Montana Bank of Circle, N.A. vs. The United States (Court of Claims No. 328-77), under identical legal and factual issues as to the Tribe, remanded to the Trial Judge the breach of fiduciary duty claims of the petitioner Bank noting that the case

in this area involved issues of first impression:

> "The two counts based on breach of fiduciary obligation present unique and factually complicated arguments involving several issues of first impression." (At page 3.)

As to the instant case, in its Order of August 6, 1982, under identical facts and legal issues as to the Tribe, the Court of Claims dismissed the Indian Community's petition for failure to state a claim within the jurisdiction.

8. REASONS FOR GRANTING THE WRIT

A. Conflict of Authority, Diverse Decisions, and Pending Cases

Rule 17.2 of the Rules of the United States Supreme Court provides that the same general considerations outlined in Rule 17.1 "will control in respect of petitions for writs of certiorari to review judgments" of the Court of Claims. Rule 17.2, USCS, Supreme Court Rules.

Rule 17.1 provides for consideration of a conflict in decisions as being a basis for review on certiorari as well as a decision which has decided an important question of federal law which has not been, but should be settled by this Court. Rule 17.1(a) and (c), USCS, Supreme Court Rules. And despite any absence of conflicting decisions, where there is a diversity of decisions at a court level and other cases pending in which action is awaiting authoritative settlement of the question presented by the petitioner for a writ of certiorari, a question is sufficiently important to invoke the jurisdiction of this Court. United States v. Constantine, (1935) 296 US 287, 80 LEd 233, 56 SCT 223. (Under predecessor to Rule 17.)

There are currently pending before this Court two cases upon which certiorari has been granted which have a bear-

ing on this case. United States v. Mitchell, No. 81-1748, 664 F.2d 265 (1981), and United States v. Duncan, No. 85-1747, 667 F.2d 36, cert. granted, 50 U.S.L.W. 3959 (June 8, 1982).

It is respectfully submitted that there is such a conflict of authority, a diversity of decisions, and pending cases in which action is awaiting authoritative settlement of the question presented here, that a writ of certiorari should be granted in the instant case.

Additionally, and apart from the above, the order to which this writ is directed has decided an important question of federal law which has not been, but should be settled by this Court.

B. Authority on the Question

(1) The Court of Claims Below

The Order of August 6, 1982 of the United States Court of Claims, relief from which this application is directed

towards, dismissed petitioner Tribe's claims as to damages for breach of a fiduciary relationship on the gound of lack of jurisdiction. Order, Appendix, infra., page A-2 through A-10.

The basis for the Court of Claims finding of no jurisdiction was that 25 U.S.C. 81, relied on by petitioner, cannot fairly be interpreted as mandating compensation by the federal government for the damage sustained, citing United States v. Testan, 424 US 392, 398 (1976). Order, page 3 thereof, Appendix, infra., pages A-5 and A-6.

Jurisdiction by the Court of Claims is based on 28 U.S.C. §1505, which confers upon the Court of Claims jurisdiction to entertain claims against the United States by Indian tribes to the same extent that claims would be cognizable in court if the claimants were not Indians, under the Tucker Act, 28 U.S.C.

§1491. United States v. Mitchell, (1980, US) 63 LEd2d 607, 100 SCT 1349.

The Tucker Act provides that: (in pertinent part)

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort ..."
>
> 28 U.S.C. §1491.

(2) The Limits of Testan

In 1976, in United States v. Testan, 424 US 392, 47 LEd.2d 114, 96 S. Ct. 948, the U. S. Supreme Court for the first time considered under what circumstances as Act of Congress gives rise to a claim for damages under the Tucker Act's "Founded ... upon ... any Act of Congress" language. This Court held that a statute other than the Tucker Act

creates a substantive right enforceable against the United States in money damages only if it "'can fairly be interpreted as mandating compensation the the federal government for the damages sustained'". Id., at 400, 47 LEd.2d 114, 96 SCT 948, quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967).

Testan, op. cit., thus stands for the proposition that when reliance is placed on the "Act of Congress" language of the Tucker Act (28 U.S.C. §1491), the jurisdictional question under the Tucker Act turns on a determination of whether the particular claim fits within any of the categories of another federal act, where the Act relied upon can be fairly interpreted as mandating compensation by the federal government for the damage sustained.

Unanswered by Testan, op. cit., was

whether reliance on the "or for liquidated or unliquidated damages in cases not sounding in tort" language of the Tucker Act (28 U.S.C. §1491) is sufficient to provide the creation of a substantive right enforceable against the United States for damages.

In Mason v. United States, 461 F.2d 1364, 1374 (Ct. Cl. 1972), rev'd on other grounds, 412 US 391 (1973), the Court of Claims indicated that claims for breach of trust would fall within this category of claims: (Emphasis supplied.)

> "A suit against the United States on behalf of the estate of a non-competent Indian, for damages for compensating the estate for breach by the Government of its trust obligations under a federal statute, is within 28 U.S.C. Section 1491 as a claim founded upon an Act of Congress and for damages 'in cases not sounding in tort.'"

The United States did not raise any jurisdictional issue in this Court.

The Court of Claims in Mitchell v. United States, 591 F.2d 1300 (Ct. Cl. 1979), Rev'd. 445 US 535 (1980), declined to consider the Tucker Act category of claims "for liquidated or unliquidated damages in cases not sounding in tort," as possibly covering the case before it, since there was specific legislation creating the trusteeship from which the claims arose. Id., at p. 1305.

Even after remand by United States v. Mitchell, 445 U.S. 535, 100 S. Ct. 1349, 63 LEd.2d 607 (1980), the Court of Claims again bypassed the issue:

> "Again we bypass (see our prior Mitchell opinion, 219 Ct. Cl. at _____, 591 F.2d at 1301-02), the phrase in 28 U.S.C. §1491 giving this Court jurisdiction over claims against the United States for 'liquidated or unliquidated damages in cases not sounding in tort.' Plaintiffs do not rely on that clause which has never been fully and authoritatively construed but rather on specific legislation as founding their

claims."

> Mitchell v. United States, 229 Ct. Cl. _____, 664 F.2d 265 (hereinafter Mitchell II), cert. granted, 50 USCW 3959 (June 8, 1982).

(3) The Limits of Mitchell

This Court, in United States v. Mitchell, 445 US 535, 100 S. Ct. 1349, 63 LEd.2d 607 (1980) held that: a. Under neither the Indian Claims Commission Act (28 U.S.C. §1505), giving the United States Court of Claims jurisdiction as to claims by Indian tribes founded upon the Constitution, federal laws, or treaties, nor under the Tucker Act (28 U.S.C. §1491) giving the Court of Claims jurisdiction as to any claim against the United States founded either upon the Constitution or any Act of Congress, is there a substantive right against the U.S. to recover money damages; b. The General Allotment Act (25 U.S.C. §331, et seq.) did not create any fiduciary

responsibility in the United States for management of forest lands.

Unanswered and expressly left open by the Court was the issue of whether a statute imposing on the Government general fiduciary duties toward the Indians would constitute a waiver of sovereign immunity:

> "We need not consider whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity. We conclude that the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." Id., at p. 615.

Thus, Mitchell merely holds that the General Allotment Act doe not confer general fiduciary responsibilities, leaving open the possibility that some other act would, and if it did, sovereign

immunity would be waived.

Furthermore, Justice Marshall, in United States v. Mitchell (1980), 63 LEd.2d 607, 100 SCT 1349, commenced his examination of the General Allotment Act with the declaration that the Act "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." Id., at 615.

This requirement of an "unambiguous expression of congressional intent is a very strict standard of construction and at odds with two familiar canons of construction also adopted by this Court: The "plain meaning" rule and the rule that statutes intended to benefit Indians are to be liberally construed in the Indians' favor.

The former "plain meaning" canon formed the basis for this Court's decision in United States v. Clarke, 445 US

253 (1980), handed down less than one month before Mitchell, ibid., and involved an Indian allotment in Alaska. [One Hornbook specifically discusses the General Allotment Act as exemplary of the proposition that the United States may act as Trustee. A. Scott, Law of Trusts §95 (1967]. Under the "plain meaning" canon, the General Allotment Act clearly established a full fiduciary relationship.

The latter canon formed the basis of Squire v. Capocman, 351 US 1 (1856), a case involving allotments on the Quinault Reservation.

(4) The Limits of Mitchell II

In United States v. Mitchell, 445 US 535, op. cit., the Supreme Court reversed and remanded the prior decision of the Court of Claims to consider the plaintiffs' other grounds for asserting that the Government was liable in money damages for the alleged mismanagement.

445 US at 546, N.7, 100 S. Ct. at 1356, N.7.

Mitchell II, op. cit., held that, if a statute creates or recognizes the United States as general trustee of Indian property, that legislation ordinarily founds a substantive monetary claim for breach of that trust. This is a claim which may be vindicated by the Indian beneficiary through a suit for breach of that trust. It may be brought in the Court of Claims under 28 U.S.C. §1491 (and 28 U.S.C. §1525). Mitchell v. United States, 664 F.2d 265 (1981), certiorari granted.

(Continued on next page.)

Whether that proposition will be sustained by this Court is an open question and one which has a direct bearing on this case.

But the Court of Claims in Mitchell II, supra., made clear what the rest was in connection with the statutes there involved:

> "The common thread of the statutes we have just construed as contemplating compensation to the Indians is that they all (a) deal with Indian-owned property, (b) directed to be managed and controlled by federal officials as fiduciaries, (c) in the express interest of and for the benefit of the Indians, and (d) from which the Congress clearly wanted the Indians to obtain the financial benefits. In sum, this is a typical Indian trust relationship involving monetary

(Continued on next page.)

benefits to the beneficiary."

Id., at p. 273.

In its discussion of one of the statutes which expressly required funds to be paid for the benefit of the members of the tribe, the Court of Claims recognized that such provisions are not the criteria:

> "Congress had a longer reach. It created a fiduciary relationship through this statute and required that sales must be based upon a consideration of the needs and best interests of the Indian owners and his heirs. (citation). That was always the ultimate goal.
>
> ***
>
> To us, Congress has authorized the Indians to claim compensation for a breach of the trust Congress has itself fixed in order that the beneficiaries shall receive the benefits Congress plainly contemplated for them. A trust normally entails the right to compensation for the trustee's breach (G. Bogert, The Law of Trusts & Trustees §862 (2d ed.1965)); 3 A. Scott, The Law of Trusts §205 (3d ed. 1967), and this statute does not in any way

suggest otherwise."

Id., p. 271.

It is submitted, and will be shown, that the Court of Claims, bound by its own decision in Mitchell II, supra., failed in the instant case to properly apply it and that the result reached in this case is contradictory to the result reached in Mitchell II, supra.

(5) The Limits of Other Holdings of the Court of Claims

The Court of Claims has also held that "where the federal government takes on or has control of supervision over tribal monies or properties, the fiduciary relationship normally exists with regard to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or fundamental document) about a trust fund, or a trust or fiduciary connection."

Navajo Tribe of Indians vs. United States, 224 Ct. Cl. _____, _____, 624 F.2d 981, 987 (1980).

In a companion case to Mitchell II, supra., likewise before this Court on a petition for writ of certiorari, Duncan v. United States, Ct. Cl. _____, _____, 667 F.2d 36 (1981), the Court of Claims found that certain legislation involving Indian rancheria status authorized and mandated compensation for federal breaches of trust, and that the Court of Claims was the proper forum for claims arising from the breach of such trust.

The breach in that case primarily involved the failure of the United States to provide the Indians with a sufficient water system:

> "Chief among these [obligations left unfulfilled by the Government] was the directive ... to construct and improve (before termination) the sanitation and water facilities upon which the department

should agree with the Indians." Id., p. 43.

This was sufficient for the Court's conclusion that it could be fairly interpreted that the legislation mandated compensation for damages sustained.

Duncan, supra., is clearly contrary to the holding of the Court of Claims in the instant case.

(6) Pursuant to 25 U.S.C. §81, Congress has mandated and authorized compensation for federal breaches of trust, and the Court of Claims is the proper forum for petitioner

Petitioner relies in part upon 25 U.S.C. §81, which provides that no agreement shall be made by any person with any tribe "for the payment *** of money" unless "such contract or agreement be executed" and bears "the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it." 25 U.S.C. §81, Appendix, infra., at page

A-38.

As acknowledged by the Court of Claims in the instant case:

> "The statute was designed to protect Indians by subjecting their contracts to the prior examination and approval of the Secretary of the Interior and the Commissioner of Indian Affairs. [citation]." Order, Ct. Cl., at Appendix, infra., page A-8.

At issue, and disputed by the Court of Claims, is whether the Act created a fiduciary relationship.

The Court of Claims in the instant case found that the congressional intent to protect Indians found in 25 U.S.C. §81 was far short of the congressional intent required to create a fiduciary duty:

> "The statute now before us falls far short of imposing a fiduciary obligation upon the United States that would make the government liable for losses Indians may suffer as the result of their contracts with third parties that the government approved." (citation omitted). Order, at Appendix, infra., p. A-9.

However, in the case of Montana Bank of Circle, N.A. vs. The United States, Ct. Cl., No. 328-77, the order of that Court in a matter involving the identical factual matters before this Court, and with plaintiff in that case relying on identical statutes and a treaty, the government in its answer admitted the existence of a trust relationship with the tribe:

> "Plaintiff relies on both a treaty and on several statutes to establish defendant's fiduciary obligations to the Fort Belknap Indians, and defendant, in its answer, has admitted the existence of a trust relationship with the Tribe."
>
> Order, Appendix, at pages A-63 and A-64.

Apart from this admission, which this Court can take judicial notice of in this case, when the United States asserts its control over a particular sphere of activity -- here contract or agreement approval -- which affects a tribe, the

courts treat the action as creating a fiduciary relationship. Joint Tribal Council Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (federal government's consent required for all land transactions gave rise to a trust relationship with respect to land transactions); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) (power in Secretary of Interior to license traders on Indian reservations created duty); Aleut Community of St. Paul Island vs. United States, 202 Ct. Cl. 182, 480 F.2d 831 (Ct. Cl. 1973) (legal obligation to protect subsistence hunting based on language in a treaty and two statutes which recognized the importance of subsistence hunting but did not declare its protection to be a legal obligation of the U.S.).

Here, the purpose found by the Court of Claims for 25 U.S.C. §81 was the protection of the Tribe. Order, at page A-8,

citing H.R. Rep. No. 2449, 85th Cong., 2nd Sess. 1, reprinted in 1958 U.S. Code Cong. & Admin. News 3961. It is submitted that such an expressed legislative intent is sufficient to provide the basis for the fiduciary relationship.

The contracts of the Tribe are of course "property". And when the government controls or has supervision of properties, unless Congress has provided otherwise, the fiduciary relationship normally exists with respect to such properties, even though nothing is said expressly in the statute about a trust or fiduciary connection. Navajo Tribe of Indians vs. United States, 224 Ct. Cl. _____, _____, 624 F.2d 981, 987 (1980).

Nothing in the Act relied upon by petitioner Tribe herein says or suggests that Congress wishes, contrary to historical principle, to depart from the norm of fiduciary duty. See: United

States vs. Anderson, 625 F.2d 910, 915 (9th Cir. 1980), cert. den., 450 U.S. 920, 101 S. Ct. 1367, 67 LEd.2d, 347 (1981).

To hold otherwise, as the Court of Claims did here, is to fly in the face of the holdings in Duncan v. United States, supra., and Mitchell II, supra., the test in the latter case being met here by petitioner: a. The statute deals with Indian-owned property -- contract rights; b. The entry into which is controlled by the government; c. in the interest of and for the benefits of the Indians, & d. from which contracts Congress clearly wanted the Indians to obtain the financial benefits. See: Mitchell v. United States, 664 F.2d 265 (1981), pet. cert. granted, supra.

The Court of Claims clearly should have concluded that 25 U.S.C. §81 clearly authorized and mandated compensation for federal breaches of trust. The substan-

tive claim for monetary compensation was created by the legislation, which formed and continued a general trust with the implied duties not to act or omit to act in the manner alleged by petitioner in its petition: Failure to thoroughly investigate controlling parties and their subcontractors; failure to assist in contract negotiations; failure to notify petitioner of jeopardy of project and its mismanagement, after determining the truth thereof; failure to disclose known impossibility of performance of contracts, the specifications of which were drafted by the government.

The above conclusion is the plain meaning of the statute, and a liberal construction -- required when the statute is intended to benefit Indians -- provides the same answer.

(7) Pursuant to the "damages" provision of the Tucker Act, the requisite jurisdiction

is provided.

Petitioner, through its jurisdictional claim under 28 U.S.C. §1505, which allows the Tribe to proceed under the Tucker Act, 28 U.S.C. §1491, petitioner has raised reliance on the alternative "for liquidated or unliquidated damages in cases not sounding in tort," as the basis not only for jurisdiction but also for the waiver of sovereign immunity which may be required to cause the government to respond in damages.

This approach concludes that the jurisdiction grant of the Tucker Act and the waiver of immunity are congruent.

To hold otherwise will be to bar all claims based on contracts and regulations of executive agencies, as an example. If this section of the Tucker Act is not a consent to suit, there is none, as no federal contracting officer or other official is empowered to consent to suit

against the United States. United States v. New York Rayon Importing Co., 329 US 654, 660 (1947).

Not even claims based on the U.S. Constitution can otherwise be brought against the U.S. unless petitioner's position is adopted, as reflected in Duarte v. United States, 532 F.2d 850 (2d Cir. 1976), in which the Court of Appeals for the second circuit, citing Testan, op. cit., held that a claim for damages for taking of property in violation of the due process clause of the Constitution was barred by the government's sovereign immunity, because that clause contained no specific grant of a cause of action.

This Court has perhaps suggested this approach in its reference to the "waiver of sovereign immunity contained in the Tucker Act" in Hatzlachh Supply Co. v. United States, 444 US 460 (1980), decided three months before Mitchell's,

op. cit., rejection of the waiver when just federal acts are relied upon.

9. CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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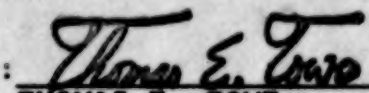
By: 
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